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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

v.

MISTER SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ADMINISTRATIVE LAW CENTER, LEGAL AID BUREAU, INC., BALTIMORE, MARYLAND

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Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967) 41

Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers — Jurisdictional Amount, the Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97 (1975) 42

Committee Staff Report on the Disability Insurance Program, Staff of the House Committee on Ways and Means (July, 1974) 16

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Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendent*, 68 Mich. L. Rev. 389 (1970) 41

Davis, *Administrative Law Treatise*, § 23.02 (Supp. 1967) 41, 48

Final Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong. 1st Sess. (1941) 29, 31, 39

Hearings Relative to the Social Security Act Amendments of 1939 Before House Comm. on Ways and Means, 76th Cong., 1st Sess. (1939) 18

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Recommendations and Reports of the Administrative Conference of the United States, (1970) 47

Report of the Disability Claims Process Task Force, reprinted in "Recent Studies Relevant to the Disability Hearings and Appeals Crisis," Subcommittee on Social Security, House Ways and Means Committee, 94th Cong., 1st Sess. (Comm. Print 1975). 17

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Report of the Social Security Board, *Proposed Changes in the Social Security Act,* H.R. Doc. 110, 76th Cong., 1st Sess. (1939) 18

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Smith, *Social Security Appeals in Disability Cases,* 28 Administrative Law Review 13 (1975) 17

Social Security Administration, *Operational Analysis of the Bureau of Hearings and Appeals* (June 30, 1975) 27

Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law and Contemp. Prob. 216 (1948) 47

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction:*

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INTEREST OF AMICUS CURIAE

Amicus, Administrative Law Center of the Legal Aid Bureau of Baltimore, is interested in this case since the decision of the Court will have an impact on the clients amicus represents. Amicus as a Legal Services program has represented hundreds of low income persons in Maryland in disability cases under Titles II and XVI of the Social Security Act. Many of these indigent clients have problems with reopening claims which were initiated and became final before they obtained counsel to assist them. Access to judicial review to control and contain administrative discretion is an important

safeguard for these individuals and amicus urges affirmance of the decision of the court below.

Both parties have consented to the filing of this brief and copies of the letters of consent have been filed with the clerk pursuant to Rule 42 (2).

SUMMARY OF ARGUMENT

There are two routes by which this Court can find that the District Court has jurisdiction to review the final decision of the Secretary of Health, Education and Welfare refusing to reopen a previously denied claim for Social Security disability benefits. The first is through the statutory judicial review provision of the Social Security Act contained in Section 205(g) of the Act, 42 U.S.C. § 405 (g). The second route, necessary to pursue only if the first is rejected, is through Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

A. Section 205(g) of the Act, 42 U.S.C. §405(g), is the usual route by which a final decision of the Secretary is appealed to the United States District Court. Section 205(g) allows for a review of "any final decision of the Secretary made after a hearing. . . ." The Secretary alleges that Sanders can not satisfy the requirements of Section 205(g) because the decision appealed is neither "final" nor one made "after a hearing." However, on the issue of reopening his previous claim, Sanders received the most administratively final decision the Secretary would allow him to obtain. Sanders presented his claim for reopening to each level of agency adjudication.

The Secretary has been allowed to consider the claim for reopening completely and has issued a final decision on the issue from his Appeals Council, the agency's highest adjudicatory body. Sanders has clearly obtained a "final decision" within the meaning of Section 205(g).

The only question then is whether or not the decision was one "made after a hearing" as is required by the language of Section 205(g). This Court's decisions in *Mathews v. Diaz,* U.S. , 96 S. Ct. 1883 (1976); *Mathews v. Eldridge,* 424 U.S. 319 (1976) and *Weinberger v. Salfi,* 422 U.S. 749 (1975) have shown that the "after the hearing" requirement has not been literally construed to mandate an actual hearing held as a prerequisite to a lower court's exercise of Section 205(g) jurisdiction. Rather, the requirement can be satisfied by a demonstration that the claim for benefits has been fully presented to the Secretary and denied. Sanders clearly presented his claim for reopening to the Secretary and was finally denied. He asked for a hearing and failed to have one only because the Secretary denied it to him. In the context of these facts, the Court should hold that Sanders, having satisifed the Section 205(g) prerequisites to the best of his ability, is entitled to invoke it as a jurisdictional base to have his claim for reopening reviewed by a District Court.

The Secretary despite *Diaz, Eldridge* and *Salfi* still persists in his assertion that a hearing in the literal sense must precede the request for judicial review. Even were this the case, Sanders was entitled under Section 205(b) of the Act, 42 U.S.C. §405(b), to a hearing on the claim to reopen since it is a decision "as to the rights of any individual applying for a payment. . . ." Only the Secretary's unlawful denial of a hearing prevented Sanders from actually receiving the hearing which is his entitlement. Even under the Secretary's erroneous view of the "after a hearing" requirement, Sanders would be entitled to judicial review since he was entitled to a hearing by statute.

The Secretary's regulations, the purposes of the Act and the legislative history of Section 205 lend support

to Sanders' entitlement to a hearing and judicial review on his claim to reopen.

B. Since there is review available within the statutory framework, the Court need not reach the issue of the Administrative Procedure Act as a basis for jurisdiction. However, if the Court found it necessary to reach this issue, jurisdiction for a District Court to review a final decision of the Secretary of H.E.W. is available within Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706.

Initially, there is no bar within the Social Security Act which would preclude review under the APA of a final agency decision that is not reviewable under Section 205(g). Although Section 205(h) of the Act, 42 U.S.C. §405(h), does impose limits on the authority of federal district courts to entertain lawsuits involving the Social Security Act, this section does not include the APA within the prohibited sources of jurisdiction. Further, the limitations of Section 205(h) are applicable only to the extent that the decision sought to be reversed is otherwise reviewable under Section 205(g). Where Section 205(g) is not otherwise available to review the final decision in issue, then the restrictions of Section 205(h) cannot operate to strip the district courts of properly invoked jurisdictional grants such as the APA.

A close analysis of the APA and its legislative history demonstrates that Congress intended to establish an independent grant of jurisdiction within the APA. This Court has, in fact, decided several cases which presume that the APA is jurisdictional. These cases were correctly decided and fulfilled the intent of Congress and the draftors of the Administrative Procedure Act to provide for judicial review of final agency action.

ARGUMENT

I.

A FINAL DECISION OF THE SECRETARY NOT TO REOPEN A CLAIM FOR BENEFITS UNDER TITLE II OF THE SOCIAL SECURITY ACT IS REVIEWABLE BY A UNITED STATES DISTRICT COURT PURSUANT TO SECTION 205(g) OF THE ACT.

The Secretary of Health, Education and Welfare has asked this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit that his decision to deny respondent Sanders' request to reopen a 1966 claim for Social Security disability benefits is subject to judicial review under Section 10 of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* (hereafter the "APA"). But the validity of the Appeals Court's decision to base its finding on reviewability on the APA need be reached by this Court only if Section 205(g) of the Social Security Act itself, 42 U.S.C. §405(g), did not confer jurisdiction on the district court to "affirm, reverse or modify" the Secretary's final determination not to reopen respondent's claim. *Mathews v. Eldridge*, 424 U.S. 319, 332 n. 12 (1976). Both the decisions of this Court and the administrative review process adopted by the Secretary demonstrate that the Social Security Act did confer such jurisdiction on the district court.

A. *The right of a claimant to an administrative hearing on the question over which judicial review is sought is not a prerequisite to a proper assertion of Section 205(g) jurisdiction.*

The Court of Appeals assumed, without elaboration, that Section 205(g) could not serve as a jurisdictional basis for review of the Secretary's decision not to reopen respondent Sanders' 1966 disability claim. (Pet. App. A, p. 5a). This assumption has been the starting point for the federal courts' analysis of Social Security reopening

cases, at least since the decision of the Ninth Circuit in *Filice v. Celebrezze*, 319 F.2d 443 (9th Cir. 1963). In *Filice*, the Ninth Circuit construed Section 205(g) to provide for judicial review only of decisions which follow upon an offer to a claimant of the opportunity for a hearing required by Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), in cases involving "the rights of individuals applying for payment." *Id.* Section 205(b) provides, in relevant part, that:

> "The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual . . . he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision."

Section 205(g), in turn, offers the following remedy to a claimant who disagrees with the disposition of his claim:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action. . . ."

Combining the language of the two subsections, the Ninth Circuit found that:

> ". . . [T]he orders made judicially reviewable by Subsection (g) of Section 405 [§205(g) of the Act] are orders authorized by Subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment, or which affirm, modify, or reverse such orders, and not orders which merely deny petitions to reopen proceedings in which such findings and decisions have been made." *Filice v. Celebrezze, supra*, 319 F.2d at 445-446.

In piecing together this construction of Section 205, the *Filice* court relied heavily on the holding of this Court six years earlier in *Securities and Exchange Commission v. Louisiana Public Service Commission*, 353 U.S. 368 (1957). In *Louisiana Public*, the Louisiana Public Service Commission filed a petition with the S.E.C. to reopen a final order made under the Public Utility Holding Company Act of 1935 which had resulted in an order to a local power company to divest itself of all non-electric assets. The S.E.C. denied the Commission's petition to reopen and the Commission then sought judicial review claiming that the statute gave it the right to such review. However, the particular statute in question provided for review only of the directory orders of the S.E.C. which actually revoked or modified an order previously made. Since the S.E.C. had not in fact revoked or modified its previous order, but merely denied a request that it do so, this Court held that the denial did not fit the specific words of the statute and that judicial review therefore could not be had under that statute which was found to be unambiguous. The Court's resolution of *Louisiana Public* rested specifically on the particular statutory language before it and not on any general proposition that agency decisions not to reopen earlier determinations are in principle unreviewable. *Louisiana Public* thus in no way undercuts the relevance, in Social Security reopening cases, of the language and history of the Social Security Act, and especially, of the decisions of this Court elaborating that language and history, most of which were not available to the *Filice* court.

In several recent decisions, this Court has had occasion to address the scope and nature of judicial review under Section 205(g) in some detail. The teaching of these decisions, *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Mathews v. Diaz*, U.S. , 96

S. Ct. 1883 (1976); *Norton v. Mathews,* U.S. , 96 S. Ct. 2771 (1976), and especially *Mathews v. Eldridge, supra,* is that Section 205(g) established a substantially more inclusive scheme of judicial review than was assumed by the Ninth Circuit in *Filice. Mathews v. Eldridge* presented a constitutional challenge to the Secretary's practice of terminating Social Security disability benefits without affording the affected recipient an opportunity for a prior oral hearing. This Court held that jurisdiction to hear such a challenge was conferred by Section 205(g), notwithstanding the fact that no administrative hearing was held on the question of the recipient's continued entitlement to disability benefits and none was even available with respect to his constitutional claim. This holding was based on the court's analysis of the prerequisites of Section 205(g) jurisdiction as consisting of two elements, one "waivable" by the Secretary, and the other indispensable to an assertion of jurisdiction, regardless of the Secretary's treatment of the claim over which review is sought. 424 U.S. at 328.

The indispensable, or non-waivable, element was a "requirement that a claim for benefits [be] presented to the Secretary." *Id.* The purpose of this requirement was the traditional one of assuring that the head of an administrative agency have an opportunity to issue "some decision" to a claimant before litigation is commenced. *Id.* Satisfaction of this purpose, however, did not require that this decision be rendered "after a hearing," the language of Section 205(g) notwithstanding. Nor, the Court made clear, did it require that the issue presented for judicial review be one which a claimant was entitled to carry to an administrative hearing. Though an aggrieved claimant could theoretically contend, at a hearing convened to review the determination that his disability had ceased, that the

failure to afford him a pretermination hearing was unconstitutional, it was "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. *The Secretary would not be required even to consider such a challenge.*" 424 U.S. at 330 (emphasis added).

Thus, it is evident that the "jurisdictional" precondition to Section 405(g) review, 424 U.S. at 328, is simply the presentation of a claim for benefits to the Secretary. The claim presented need not proceed to any administrative hearing nor need it be the sort of claim for which the Secretary is required to provide administrative review. Respondent Sanders' request for judicial review of the Secretary's refusal to reopen his 1966 claim for disability benefits therefore satisfies the non-waivable element of Section 205(g) jurisdiction; he has presented an application to reopen to the Secretary and the Secretary has denied that application. The Secretary's refusal to afford respondent a hearing on his claim, even if such refusal is authorized by the Social Security Act, did not defeat the authority of the district court to affirm, reverse, or modify that denial.

The waivable element of Section 205(g), the general requirement that "the administrative remedies prescribed by the Secretary be exhausted," 424 U.S. at 328, is in no way brought into issue by respondent Sanders' claim. The Secretary does not dispute that respondent fully pursued every step in the Social Security administrative appeals process that was made available to him. Following the initial denial of his application to reopen, respondent first unsuccessfully sought reconsideration pursuant to 20 C.F.R. §404.909. He then requested a hearing pursuant to 20 C.F.R. §404.917 and asked to

appear in person before the administrative law judge. He failed to advance his claim any further through the hearing and Appeals Council stages of the appeals process only because the administrative law judge denied his request and instead dismissed his claim. He even asked that the Appeals Council review the dismissal, but that request likewise was refused. It is thus evident that if respondent failed to "exhaust the full set of internal review procedures provided by the Secretary," he did so only because the Secretary would not open those processes to him. Under these circumstances, respondent must be said to have received the most "final" decision on his reopening claim that the Secretary was willing to provide. There can therefore be no serious argument that he has not complied with the "waivable" exhaustion prerequisite to a proper assertion of Section 205(g) jurisdiction.

Respondent Sanders' claim to reopen his unsuccessful 1966 application for disability benefits thus satisfies both elements of Section 205(g) jurisdiction outlined by this Court in *Mathews v. Eldridge, supra.* And it is satisifaction of these elements, rather than any superficial similarity to *Louisiana Public, supra,* that is dispositive of respondent's entitlement to judicial review of the Secretary's denial of that claim.

B. *Respondent's reopening claim is an application "for a payment under" the Social Security Act, within the meaning of Section 205(b) of the Act, and is therefore entitled to a hearing pursuant to that section and to judicial review pursuant to Section 205(g).*

This court's analysis in *Mathews v. Eldridge, supra,* makes clear that even if the Social Security Act authorized the Secretary to issue a "final decision" denying respondent's reopening claim without affording him a hearing on that claim that final decision is

nonetheless reviewable under Section 205(g). But if the Act required the Secretary to offer a hearing to respondent, then his reopening claim is reviewable even within the *Filice* court's holding that "the orders made judicially reviewable by subsection (g) of Section 405 are orders authorized by subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment. . . ." 313 F.2d at 445. The *Filice* court assumed that orders denying applications to reopen previously denied claims were not "orders authorized by" Section 205(b). *Id.* But this assumption runs counter to the language, history and purpose of Section 205(b), and even to the Secretary's own interpretation of the Section, as reflected in the implementing regulations he has adopted.

1. *The Statutory Language*

Section 205(b) directs the Secretary to provide a hearing whenever a "decision as to the rights of an individual applying for a payment" is contested. The Secretary now asserts, Govt. Br. at 18, that his decision not to reopen respondent Sanders' 1966 claim for disability benefits is not such a decision and may therefore be disposed of summarily. It is significant, however, that the Secretary offers no support whatever for this assertion, but instead simply posits it as a proposition that is beyond argument. But when respondent filed his second application with the Social Security Administration in March, 1973, he was seeking disability benefits. His application was ultimately styled as a request to reopen his previously denied claim because he could become entitled to the benefits he sought only by reactivating that claim. Had respondent's application been treated as a new claim, it could not possibly have been successful since his insured status for disability benefit purposes had lapsed

by the time it was filed. If, on the other hand, respondent could demonstrate a right to reopen his 1966 claim under the standards for reopening set out in the Secretary's regulations, 20 C.F.R. §404.957, he would, if the reopened claim were then granted, be awarded benefits from the date of his entitlement under that claim through the present and would thereby achieve the objective of his second application — the payment of Social Security benefits on account of his disability. To secure such payment was always respondent's only goal. Reopening became the route to attainment of that goal. The Secretary's decision to close off that route thus has no significance except as "a decision as to the rights of an individual applying for a payment" of Social Security benefits.

2. *The Secretary's Implementing Regulations*

The structure of administrative review established by the Secretary to carry out the requirements of Section 205(b) offers persuasive evidence that the Secretary himself shares the foregoing perception of the reopening process. This structure, set out at 20 C.F.R. §404.901 *et seq.*, creates a four-tiered scheme for determination and review of the "rights of an individual applying for a payment" of benefits. The four steps in the scheme are an "Initial Determination" of the claimant's rights, an informal "Reconsideration," the hearing required by Section 205(b), and, finally, an internal appellate review by the Secretary's Appeals Council. The most critical step in this review process is the first one. For the only claims which are entitled to proceed through the four steps, including the hearing mandated by Section 205(b), are those which the Secretary preliminarily disposes of through the issuance of an "Initial Determination," 20 C.F.R. §404.917. It is thus clear that the Secretary has defined a

"decision as to the rights of any individual applying for a payment," as one which is provided in the form of an Initial Determination.

The types of claims which the Secretary has determined to be entitled to an Initial Determination are catalogued at 20 C.F.R. §404.905. Prominent among the claims appearing in this catalogue are any which urge an "entitlement to monthly benefits . . . under Title II of the Act." 20 C.F.R. §404.905(a). Respondent Sanders' 1973 claim seeking to reopen his 1966 application for disability benefits unquestionably did urge such entitlement within any reasonable construction of the word. Respondent claimed that his second application presented evidence which warranted reopening, under the standards set out at 20 C.F.R. §404.957 and that he was therefore entitled to benefits on the basis of his first application.

Any alternate, specialized construction which would exclude reopening requests from those claims which urge "entitlement to monthly benefits" must overcome not only this common understanding of that phrase but also the reasonable, if not compelling, inferences afforded by the remainder of the "Initial Determination" catalogue and by the Secretary's treatment of respondent's second application. Beyond claims of entitlement to monthly benefits, the Secretary's regulations require Initial Determinations to be issued in a dozen additional situations, 20 C.F.R. §404.905(b) - (n). Many of these situations involve claims of right which are, by comparison to a request to reopen a previous claim, far more tenuously linked to the application "for a payment" which is guaranteed a hearing by Section 205(b). Among these claims are, for example, a covered worker's request that his Social Security earnings record be revised, 20 C.F.R. §404.905(g), a benefit

recipient's request that the Secretary waive recovery of prior overpayments he has received, 20 C.F.R. §404.905(m), and a recipient's contention that appointment of a representative payee to manage his payments would not serve his best interests, 20 C.F.R. §404.905(n). It is extremely unlikely that the Secretary, as a rational administrator, would elect to provide Initial Determinations, and therefore hearings, to these classes of claims, but withhold them from claims alleging compliance with the reopening standards set out at 20 C.F.R. §404.957, claims which far more directly pertain to "the rights of an individual *applying* for a payment." 42 U.S.C. §405(b) (emphasis supplied).

The Secretary has, of course, had ample opportunity directly to seek to exclude reopening cases from access to his appeals process. A list of decisions which are explicitly *not* "Initial Determinations" and, therefore, not in the Secretary's view entitled to review through a Section 205(b) hearing, is set forth at 20 C.F.R. §404.906. Conspicuously absent from this list is any reference to a decision on an application to reopen a previously denied claim. When the Secretary has promulgated a regulation which he uses exclusively to communicate the limitations he has elected to place on access to administrative review, classes of claims which do not appear in that regulation should not be presumed, *sub silentio*, to be subject to its exclusionary effect.

Persuasive evidence that the Secretary has not sought to exclude reopening cases from full administrative review, including a Section 205(b) hearing, emerges from the initial stages of his treatment of respondent's effort to reopen his 1966 claim. If requests to reopen were not entitled to a hearing, it could be safely anticipated, given the Secretary's regulatory scheme, that respondent's request would not have merited an Initial Determination. But respondent did receive not

only an Initial Determination but also a "Reconsideration," the second of the four decisions available from the Secretary's appeals process. Receipt of these two decisions entitled respondent to a hearing on the question whether his claim met the regulatory standards for reopening. 20 C.F.R. §404.917. But at the hearing step in the appeals process, the review structure prescribed by the Secretary was inexplicably abandoned. Instead of providing respondent with a hearing on his reopening claim, the administrative law judge, without citing authority for his action, summarily rejected that claim. This summary rejection of respondent's request to reopen enabled the law judge erroneously to characterize the claim before him as nothing more than a revival of respondent's first application, finally denied in 1966, and thereby to dismiss it under the doctrine of administrative *res judicata*. 20 C.F.R. §404.937(a). The summary resolution ultimately accorded respondent's reopening application is clearly inconsistent with the disposition it received at the lower levels of the appeals process. This earlier disposition, through the issuance of Initial and Reconsideration Determinations, could serve as the basis for a *res judicata* dismissal only after a hearing at which respondent's application was found not to satisfy the criteria for reopening set out at 20 C.F.R. §404.957.

In sum, the administrative review scheme established by the Secretary to carry out Section 205(b), as exemplified by the catalogue of Initial Determinations, the classes of claims excluded from that catalogue and the treatment of respondent's reopening claim itself, provides for full administrative review, including an offer of a hearing, of applications to reopen previously denied claims. The Secretary's failure to afford such review to respondent's claim amounted to a violation of his own rules.

3. *The Purposes of the Social Security Act*

The objectives and policy behind the disability insurance program under Title II of the Social Security Act are best served by providing for liberal judicial review of the Secretary's final adverse decisions.

When Congress created the original program of old age and survivors benefits, the purpose was to provide payments which would

> ". . . save men and women from the rigors of the poor house as well as from the haunting fear that such a lot waits them when journey's end is near." *Helvering v. Davis*, 301 U.S. 619, 641 (1937). *See also, Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

When the disability program for younger workers (under 50) was established in 1960[1] the policy and objectives were similar:

> "The need of younger disabled workers and their families for disability protection is, in some respects, greater than that of older workers. They are more likely to have families dependent upon them than is the case with respect to workers aged 50 and over. Many who would be eligible for disability benefits except for the age limitation are now receiving payments under the public assistance programs. With insurance benefits available to them and their dependents, some of these individuals would be no longer in need of assistance payments." H.R. Rep. No. 1799, 86th Cong., 1st Sess. 12.

Congress' primary policy objective was to establish a system to provide for the general welfare of aged or disabled individuals. The already established statutory

[1] A detailed description of the entire legislative development of the Title II disability program from 1935-1974 is included in the "Committee Staff Report on the Disability Insurance Program," Staff of the House Committee on Ways and Means, pp. 107-124 (July, 1974).

hearing procedure, §205(b), and the judicial review mechanism, §205(g), were means to implement the remedial goal, not ends in themselves. Congress clearly wanted an adjudication scheme geared to the unrepresented claimant, informal in nature and liberal in operation. *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971). Obviously, a summary application of *res judicata* principles to such claimants would not implement the spirit of the Act and would result in frustration of its remedial purposes. *See, Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969).

These objectives have of course been advanced by the reopening procedures the Secretary has established. But the availability of judicial review over denial of reopening requests advances these objectives even more since it insures a dissatisfied claimant a completely independent forum to test the agency's adverse decision. Judicial review would obviously make certain that the agency interprets its own regulations and the Act with sufficient liberality to accomplish the broad remedial purposes of the Social Security system, which are to provide benefits to those entitled to receive them and thereby to relieve the states from the support of such individuals and their families. In addition, most disability claimants are poorly educated[2] and appear unrepresented at hearings the first time their claims are considered.[3] They face a complex administrative

[2] F. Kaufman, "District Court Review of Department of Health, Education and Welfare Decisions," 26 Administrative Law Review 113, 114 (1974); J. Smith, "Social Security Appeals in Disability Cases," 28 Administrative Law Review 13, 14 (1975) [hereinafter cited as Smith].

[3] Attorneys appear in only one out of five hearings before Administrative Law Judges, Smith, p. 14, but when a claimant has an attorney his rate of success is three times greater than for those claimants who are unrepresented. See, Report of the Disability Claims Process Task Force, p. 36,

scheme with a multitude of regulations and requirements. The foregoing objectives can be best fulfilled by allowing liberal provision for reopening and by insuring that conventional judicial review is available to assure that decisions on reopening requests emerging from this scheme are supported by substantial evidence. *Cf. Universal Camera Corp. v. National Labor Rel. Bd.*, 340 U.S. 474, 490 (1951).

4. *Legislative History of Section 205*

The legislative history of §205(g) arises from the Social Security Act Amendments of 1939, 53 Stat. 1362, which inserted most of the procedural provisions of Title II into the Social Security Act. The 1939 Amendments evolved from the report and recommendations of the Advisory Council on Social Security and the recommendations of the Social Security Board. The Advisory Council was silent on procedural matters; but the Board proposed to Congress that findings of fact and decisions of the Board should be final and conclusive in the manner of the World War Veterans Act and other legislation which dealt with the handling of a large number of claims. Report of the Social Security Board, Proposed Changes in the Social Security Act, H.R. Doc. 110, 76th Cong., 1st Sess. (1939).

The House Ways and Means Committee held hearings on all of the proposals from February to April, 1939,[4] but no mention was made at the hearings of the matter of judicial review of Title II claims. After the hearings, the House Ways and Means Committee met

100-102, reprinted in "Recent Studies Relevant to the Disability Hearings and Appeals Crisis," Subcommittee on Social Security, House Ways and Means Committee, 94th Cong., 1st Sess. (Comm. Print 1975).

[4] Hearings Relative to the Social Security Act Amendments of 1939 Before House Comm. on Ways and Means, 76th Cong., 1st Sess. (1939).

in executive sessions over a period of six weeks and produced the bill (H.R. 6635) which without relevant amendments became the bill enacted by both houses of Congress and signed by the President. The only significant references to the judicial review provisions are in the House and Senate Reports which are identical in content. The House report describes the procedural amendments:

> "This section of the bill provides a detailed procedure in connection with benefit determination and payment. Administrative and judicial review provisions not now provided in the Social Security Act are included and administrative provisions are included which are similar to those under which the Veterans' Administration operates." H.R. Rep. No. 728, 76th Cong., 1st Sess. 51 (hereinafter "House Report").

See also, S. Rep. No. 734, 76th Cong., 1st Sess. 51 (hereinafter "Senate Report"). A more detailed description of Section 205(g) follows in the House Report:

> "Section 205(g) provides that any individual may obtain a review of any final decision of the Board made after a hearing to which he was a party, by commencing a civil action. . . . The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board. The provisions of this subsection are similar to those made for the review of decisions of many administrative bodies." House Report, 43. *See also* Senate Report, 52.

In summarizing Section 205(b), the subsection which determines entitlement to a hearing, the House Report states:

> "Section 205(b) outlines the general functions of the Board in determining rights to benefits. It requires the Board to offer opportunity for a hearing, upon request, to an individual whose

rights are prejudiced by any decision of the Board." House Report, 42. *See also*, Senate Report, 51.

The legislative history is admittedly sparse. It reveals no direct congressional consideration of the problem of review of requests to reopen. *See, Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975). But the history clearly offers no indication that Congress sought to draft the very narrow grant of jurisdiction which the Secretary now ascribes to Section 205(g). It rather shows that Congress intended to provide a mechanism to allow for hearings and judicial review for any "individual whose rights are prejudiced by any decision of the Board." House Report, 42. This intention both supports and is advanced by a construction of Sections 205(b) and (g) to authorize both an administrative hearing and judicial review of the issue whether a claim to reopen a previously denied application meets the standards for such reopening set out in the Secretary's regulations.

Amicus submits, in sum, that the language of Section 205(b), the Secretary's administrative review procedures and the purposes and history of the Social Security Act show that a request to reopen is an application "for a payment under" the Act. Such a request is accordingly entitled to a hearing pursuant to Section 205(b) and thus to judicial review under Section 205(g).[5]

[5] An alternate method of reaching the same result is to view the claimant's right to reopen under the Secretary's regulation, 20 C.F.R. 404.957, as one of the "rights of any individual applying for a payment . . ." Section 205(b). This right to request a reopening survives beyond the original denial of benefits becoming final. The right is obviously not extinguished by the original application becoming final and, in fact, becomes meaningful only at that time. As a continuing and surviving right of an individual who once applied for a payment, it clearly fits the words of Section 205 (b) and thus entitles the claimant to a hearing on that issue.

II.

IF JUDICIAL REVIEW OF RESPONDENT'S REOPENING CLAIM IS NOT AVAILABLE THROUGH SECTION 205(g), REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §701-706, IS NOT PRECLUDED BY SECTION 205(h) OF THE SOCIAL SECURITY ACT.

Should this Court decide, contrary to the position advanced above by amicus, that jurisdiction to review respondent's application to reopen his 1966 claim for disability benefits is not conferred by Section 205(g) of the Social Security Act, it will hold, in effect, that Section 205(g) review is available only to a claim for which a Section 205(b) hearing must be provided and that a reopening application may be summarily disposed of without the offer of such a hearing. On this view of Section 205(g), it is plain that its companion provision, Section 205(h) of the Social Security Act, 42 U.S.C. §405(h), does not operate to bar review of reopening cases pursuant to the grant of jurisdiction provided by Section 10 of the Administrative Procedure Act, 5 U.S.C. §701-706 (hereafter the APA).

Amicus demonstrates, *infra*, that the APA confers an independent grant of subject matter jurisdiction on the United States district courts. Assuming this court does not hold otherwise, the issue before it becomes whether Section 205(h) contains language which precludes the exercise of that jurisdiction in reopening cases. Section 205(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such a hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Secretary or any officer or employee thereof shall be brought under Section 41

of Title 28 to recover on any claim arising under this subchapter."

The second and third sentences of this paragraph obviously impose limits on the authority of federal district courts to entertain lawsuits involving the Social Security Act. This Court has recently had occasion to discuss the nature and scope of these limits, especially those prescribed by the third sentence. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court construed the third sentence of Section 205(h) absolutely to preclude the assertion of jurisdiction under the general grant for "federal questions", 28 U.S.C. §1331, over any claim arising under Title II of the Social Security Act. The Secretary contends that the logic of this construction would equally bar a court from relying on the APA as a source of jurisdiction over any such claim. Govt. Br. at 13. The difficulty with this contention is that the restriction imposed by the third sentence of Section 205(h) applies by its terms only to those grants of jurisdiction contained in Section 41 of Title 28 of the United States Code. Section 1331 was, of course, one of these grants. The APA, however, was placed by Congress in Title 5 of the Code and thus outside the reach of the limiting language of Section 205(h). Since the court's analysis of jurisdiction in *Salfi, supra*, proceeded entirely from this language, it should not be held either directly or inferentially to apply to jurisdiction under the APA.

The omission of the APA from the sources of jurisdiction foreclosed by the third sentence of Section 205(h) cannot properly be regarded as merely technical or ascribed to congressional oversight. By enacting Section 205(h), Congress did not, as the Secretary implies, bar the applicability of all then extant grants of jurisdiction to the federal courts to all claims arising under the Social Security Act. Notably absent from the

sources of jurisdiction withdrawn by the third sentence was the mandamus power to compel a federal official to perform a clear, ministerial duty owed to any person. In 1939, when Section 205(h) was enacted, this power resided exclusively in the courts of the District of Columbia where it had developed as part of the common law of the nation's capital. *McIntire v. Wood,* 11 U.S. (7 Cranch.) 504 (1813); *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). The mandamus power had not been codified,[6] did not, therefore, appear in Section 41 of Title 28 and was consequently unaffected by the third sentence of Section 205(h). The mandamus power is the only source of federal jurisdiction other than the APA which specifically and exclusively provides for review of the actions of federal officials. Their common exclusion from the sweep of the generic restriction imposed by the third sentence of Section 205(h) is in this sense readily understandable. Congress sought to assure that questions involving the construction and effect of the Social Security Act would generally reach federal courts through the avenue provided by Section 205(g). But at the same time Congress did not wish thereby to exempt the Secretary from the judicial review available against federal officials generally, through the mandamus power and the APA, for breaches of duty and abuses of discretion when such breaches or abuses could not be reviewed and corrected pursuant to Section 205(g).

This understanding of Congress' design in imposing the restrictions contained in the third sentence of Section 205(h) draws additional support from the purposes which underlay the enactment of the APA. As

[6] The mandamus power was not codified until 1962 when, pursuant to the Mandamus and Venue Act, 76 Stat. 744, P.L. 87-748 (1962), all federal district courts were authorized to entertain suits in the nature of mandamus. This authorization was and continues to be reflected at 28 U.S.C. §1361.

amicus points out at pp. 35-37, *infra*, one of the most important of these purposes was to assure the availability of judicial review to persons aggrieved by federal agency decisions alleged to be lawless or arbitrary. Accomplishment of this purpose was considered by the framers of the APA to require an expansion of the subject matter jurisdiction of the federal district courts. Nothing in the language or history of the APA indicates that this establishment of a new jurisdictional source to accomplish new remedial purposes was foreclosed to persons affected by arbitrary actions at the hands of the Social Security Administration.

The availability of APA jurisdiction is explicitly left unaffected by the language of the third sentence of Section 205(h). On this basis alone, this language must be read as having no bearing on the question whether the APA confers jurisdiction over respondent's reopening claim. But in addition the omission of the APA from the restrictive reach of the third sentence cannot properly be viewed as accidental. Rather, it forms part of a coherent assignment to the various classes of claims which may arise against the Secretary, in his role as the Cabinet official responsible for the administration of the Social Security Act, of a grant of subject matter jurisdiction appropriate to each.

The restrictions imposed by the second sentence of §205(h) are not pertinent to the issues presented by the Secretary's petition, for, unlike those contained in the third sentence, they are not jurisdictional. Rather, as this Court noted in *Weinberger v. Salfi, supra*, they are designed to "assure that administrative exhaustion will be required." 422 U.S. at 757.

The Court's understanding of the second sentence of Section 205(h) as a codification of the doctrine of exhaustion of administrative remedies is the only

sensible one. For if the sentence's language were read literally to preclude review of any "decision of the Secretary . . . except as . . . provided [by Section 205(g)]," the sweeping jurisdictional restrictions of the third sentence would be entirely unnecessary and its enactment, therefore, wholly useless and redundant. If the third sentence is not to be so "relegated . . . to a function already performed by other statutory provisions," *Salfi, supra* at 759, the second sentence must be construed simply to require that those claims which are entitled to administrative review pursuant to Section 205(b) will come to Court, if at all, only after such review has been exhausted, and then pursuant to the grant of jurisdiction provided by Section 205(g).

Respondent Sanders' entitlement to judicial review of his request to reopen under the APA is, on this reasoning, unaffected by the second sentence of Section 205(h). For by postulate, the question whether the APA confers jurisdiction over reopening claims is presented only if such claims are not judicially reviewable under the authority of Section 205(g), because they are not entitled to administrative review pursuant to Section 205(b). And it is plain enough that an applicant for reopening cannot be required to exhaust administrative remedies which may properly be, and in respondent's case indeed have been, foreclosed to him.

The opinion of the United States Court of Appeals for the Second Circuit in *Cappadora v. Celebrezze*, 356 F.2d 1 (2nd Cir. 1966) thus remains sound in its treatment of the second sentence of Section 205(h).[7] In *Cappadora*, Judge Friendly, writing for the Court, found that:

[7] The Secretary's intimation, Govt. Br. at 13-14 n. 2, that the Second Circuit has, in its recent holding in *South Windsor Convalescent Home Inc. v. Mathews*, No. 75-6136 (2nd Cir. July 27, 1976) repudiated its opinion in *Cappadora* is, with respect, mistaken. The *South Windsor* holding,

> "Although it could be argued that the second sentence of §405(h) of the Social Security Act is a statutory preclusion of such review, the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than that provided in §405(g)." 356 F.2d at 5.

Judge Friendly then went on, as Amicus points out *infra*, to hold that the APA provides a source of jurisdiction "to review refusals to reopen" in order to provide relief from "unreasonable or inappropriate agency rule[s] on reopening, . . . unreasonable deviation[s] from [appropriate] rules," or any other "truly arbitrary decision." *Id.* at 6. Judge Friendly considered the availability of such relief to be essential in order to "maintain . . . the proper bounds of administrative discretion and safeguard . . . the rights of the individual." *Id.* But he also found that the provision of judicial review over reopening cases "would impose a relatively slight burden on the agency and the courts." *Id.*

Experience since *Cappadora* suggests that the burden on the courts has indeed been slight. Even though courts in the vast majority of the ten Circuits have now found jurisdiction to review the Secretary's refusal to reopen, Amicus can discover only 33 cases reported in calendar years 1974 and 1975 from the District and Circuit Courts which dealt with the substantive issues of reopening/res judicata. Amicus Appendix, p. 1a-4a.

following *Weinberger v. Salfi, supra,* relied on the *third* sentence of Section 405(h) to preclude the assertion of jurisdiction under 28 U.S.C. §1331 over a provider's challenge to the statutory and constitutional validity of a Medicare regulation. The Court went on, however, to find that the provider could present its challenge to the United States Court of Claims pursuant to 28 U.S.C. §1491 on the theory that Section 1491 was not included in "Section 41 of Title 28," and thus not subject to the restrictions imposed by that sentence.

These cases reflect only a minuscule portion (less than 1%) of the over four thousand Social Security cases disposed of by the federal courts during this period. See Operational Analysis of the Bureau of Hearings and Appeals (June 30, 1975), p. 30-31. This experience suggests that the Secretary's fear of a decision adverse to him "flooding the courts with great numbers" of cases (Govt. Br. at 9) is both speculative and alarmist.

The record since *Cappadora* also suggests that the decision is not one safely left to agency discretion as advocated by the government (Govt. Br. 10-11, 22). Of the 32 cases with opinions reported in calendar years 1974 and 1975, from those Circuits which have recognized the courts' jurisdiction to review the Secretary's refusal to reopen, the courts have found the Secretary to be erroneous 14 times on the merits of the claim, i.e. in 43% of the reported cases. Amicus Appendix, p. 1a-4a.

Thus the availability of judicial review, under the APA, to correct agency abuses of discretion in reopening cases has proved to be salutary in its effects and extremely limited in its impact on the caseload of the federal courts. Judge Friendly's construction of the second sentence of Section 205(h) in *Cappadora*, ratified by this court in *Salfi, supra,* has been shown to provide sound policy guidance as well as the only coherent account of Congress' purpose in enacting it.

III.

SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT PROVIDES AN INDEPENDENT GRANT OF JURISDICTION FOR REVIEW OF AGENCY ACTION IN APPROPRIATE CASES INCLUDING REFUSAL TO REOPEN AN APPLICATION FOR SOCIAL SECURITY BENEFITS PREVIOUSLY DENIED.

The Secretary has attempted to depict the Seventh Circuit's characterization of Section 10 of the Adminis-

trative Procedure Act, 5 U.S.C. §§701-706, as a mistaken reading of the law. To this end, he contends that the APA cannot act as a grant of jurisdiction, but rather that its provisions only "regulate the particular procedures, forms and standards for judicial review of claims of legal injury . . .," Govt. Br. at 24, and that its structure and legislative history, and the Supreme Court cases interpreting it, all support this observation. The argument is premised on the existence of an observable distinction between "reviewability" and "jurisdiction"; the former apparently is directed towards the types of cases, the kinds of plaintiffs, and the status of the claim for which there should be review, while the latter is concerned with the power of a court to hear a claim. Thus, the Secretary has attempted to discern a clear-cut difference between the propriety of review and the authority to review, with the intent of concluding that Section 10 only encompasses the first.

The Secretary's distinction is, however, based on language which is strongly indicative of a congressional intent and assumption that the APA would provide a court with jurisdiction. The Secretary argues that since this language does not specifically state that the APA confers jurisdiction, that it cannot represent an independent jurisdictional basis. Govt. Br. at 29. Although an explicit grant of jurisdiction would have prevented any need for judicial elaboration of Section 10, a determination that the section does not provide such a grant would violate the entire thrust and tenor of the APA. The non-jurisdictional construction of the language creates an essential contradiction: there would be little purpose in the ten-year effort directed towards the development of the APA if its effectiveness were dependent on factors essentially unrelated to the need and desirability of review. The APA encompassed virtually every facet of administrative review, and it is

incomprehensible that Congress, in constructing this mechanism, would have assumed that only a few, those meeting standards unrelated to the question of review, would have access to the system.

A. *The general legislative history of the APA indicates an assumption that Section 10 would act as an independent grant of jurisdiction.*

As the Secretary has indicated, the APA was the result of extensive study and analysis intended to revamp, modernize, and clarify administrative review. President Roosevelt requested the Attorney General to appoint a committee to investigate the area, and he considered that study significant enough that he vetoed the 1939 Walter-Logan Bill, which also concerned administrative procedure, in anticipation of the Attorney General's report. S. Rep. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248, 79th Cong., 2d Sess. 189-190 (1946).[8] That Final Report of the Attorney General's Committee on Administrative Procedure examined in detail the present structure of administrative review in existing federal agencies, indicating, *inter alia,* its belief that "there has been little question as to the propriety of judicial review of administrative adjudication." S. Doc. No. 8, 77th Cong., 1st Sess. 75 (1941). Despite suggesting that judicial review was appropriate "to check extremes of arbitrariness or incompetence in administration adjudications," *id.* at 78, the Committee majority did not include a section on judicial review in its proposed bill. *Id.* at 191-202. But the three-person minority, whose recommendations on judicial review were generally incorporated into the APA, indicated a strong belief in the need for a comprehensive process of

[8] Much of the legislative history relied upon in this Brief was printed in S. Doc. No. 248, and future references, in addition to listing the particular report or proceeding, will cite the appropriate pages in S. Doc. No. 248.

judicial review. *Id.* at 209-12. Rather than permitting the courts to decide whether to review on a case-by-case basis, the minority requested that Congress "provide more definitely by general legislation for both the availability and scope of judicial review, in order to reduce uncertainty and variability." *Id.* at 211. Further, they offered a proposed statute on judicial review which, in many respects, was similar to the ultimate result: Section 10 of the APA. In the proposed subsection (b) [which evolved into subsection 10(a) of the APA, 5 U.S.C. §702] the minority indicated clearly that, except for specific statutory statements to the contrary, "any person adversely affected by any final decision of any agency" would have judicial review in accordance with applicable statutory provisions, "or, in the absence thereof, by application in equity or for writ of mandamus." *Id.* at 246. The Secretary could be expected to read this section as merely indicating that such decisions would be reviewable only if a court could properly exercise subject matter jurisdiction. But the more appropriate reading is that the minority intended this section to provide a grant of jurisdiction for those cases where none then existed.

In the Senate's consideration of S. 7, which became, in slightly different form, the APA, H.R. No. 1980, 79th Cong., 2d Sess. (1946), in S. Doc. No. 248 at 250, the Attorney General committee's minority position on the need for a clear statement of judicial review was solidified. Contrary to the Secretary's argument, the Senate Judiciary Committee viewed the APA as representing a significant change in the law applicable to administrative agencies: "The bill [S. 7] . . . is not a specification of the details of Administrative procedure, nor is it a codification of administrative law. Instead, out of long consideration and in the light of the studies heretofore mentioned, there has been framed an outline

of minimum basic essentials." S.R. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248 at 193. The Report's next paragraph describes what those essentials are. The bill was to provide affected parties a way of knowing what their rights were; it was to provide administrators with a comprehensive method of handling appeals of agency decisions; and, most instructively, "[t]he jurisdiction of the courts is clearly stated." *Ibid.*[9] Thus, the Judiciary Committee determined that the bottom line for a legitimate administrative procedure was the guaranteed availability of the courts for review of agency decisions. Without such availability, there would be no check on the agencies, and "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Id.*, at 212.

The Senate Judiciary Committee, of course, recommended that the bill be passed. They viewed judicial review as a prerequisite to the effectiveness of the bill as a whole. "It is indispensable since its mere existence precludes the arbitrary exercise of powers or assumption of powers not granted." *Id.*, at 217. And it was clear to the Committee that inherent in the concept of S. 7 was that such review was thereby guaranteed: "[T]he enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis." *Ibid.* This view was echoed on the Senate floor by Senator McCarran, the Chairman of the

[9] In a sentence summarizing these three essential features of the bill, the Judiciary Committee Report states: "The bill thus provides for public information, administrative operation, and judicial review." S.R. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248, at 193. Thus, the logical construction of the paragraph and the summarizing sentence is that, in the Committee's view, jurisdiction and review are the same; the Senate Committee assumed that jurisdiction was encompassed in the notion of review.

Judiciary Committee. See Proceedings in the Senate, March 12, 1946 in S. Doc. No. 248 at 326. The Senator also indicated in an exchange with Senator Austin the significance which he attached to the measure and the impact which he expected it to have on the availability of judicial review.

> (Mr. Austin) Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> (Mr. McCarran) That is correct.
>
> (Mr. Austin) And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward *for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?*
>
> (Mr. McCarran) That is correct. (Emphasis added.) *Id.*, at 311.

One can only surmise that Senators McCarran and Austin considered that the proposed bill would assure access to the judiciary for review of agency action. It is inconceivable that beneath their pointed discussion of the measure's intention to remedy a defect was a belief that the defect could only be remedied if the court had a separate source of jurisdiction. The Secretary would apparently read the exchange as indicating only that Section 10 was to provide a greater range of reviewability, yet a common-sense reading suggests that the issues of reviewability and jurisdiction were considered interchangeable. Senator Austin was obviously concerned about the impact of Section 10, and wished to assure himself and other Senators that, in fact, its purpose was to provide the ultimate review of agency action where necessary. Senator McCarran's response to Senator Austin provided this assurance. The defect in previous administrative law was remedied by a

guarantee that agency action was reviewable, a guarantee which necessarily implied that a court had the jurisdiction to undertake that review.

Discussion of the bill on the House floor yielded a similar understanding of the intended reach of the APA. On the House floor, Representative Walter of the House Judiciary Committee discussed Section 10 in these words:

> Section 10 is a comprehensive statement of the right, mechanics, and scope of judicial review. It requires an effective, just, and complete determination of every case and every relevant issue. It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would thus be subject to judicial review under the bill. . . .

Proceedings in the House, May 24, 1946, in S. Doc. No. 248 at 368.

In short, a review of the overall thrust of Section 10, by those proposing it and by those considering it, indicates a concern with the practical availability of review. Under that general heading, "review", may be found the Secretary's dual concepts of reviewability and jurisdiction, the latter a necessary predicate to the exercise of the former. As viewed by the proponents of the legislation, and those to whom it was presented, the measure offered no distinction between reviewability and jurisdiction. The assumption, as the legislative history highlights, was that agency action was generally reviewable; no claim was made that it would be reviewable only in those situations where jurisdiction otherwise existed. Consequently, the Secretary's contention that the absence of an explicit statement of jurisdiction must be read to mean that the APA did not provide such a grant is in direct opposition to the comprehension of the responsible legislators. Their

understanding was that a court was positioned to review agency action by the determination that such action was reviewable. Their assumption was that jurisdiction was encompassed in the notion of reviewability.

B. *A close analysis of the applicable subsections of Section 10, and of their legislative history, supports the conclusion that it does represent an independent grant of jurisdiction, which is properly exercised in this case.*

The Secretary has discussed at length several parts of Section 10, concluding that appropriate provisions preclude application of the APA to this case, or, alternatively, that taken individually and as a whole, they demonstrate that Section 10 offers no independent grant of jurisdiction. The introductory paragraph to Section 10, 5 U.S.C. §701, sets out the two basic exceptions to the availability of judicial review of agency action: where other statutes specifically preclude judicial review and where agency action is committed to agency discretion by law. The first exception was an acceptance of the fact that in some statutes Congress had previously excluded the judiciary from reviewing an agency decision. The relevance of this section to the merits of this case have previously been noted in the discussion of Section 205(h) of the Social Security Act, *ante*, at pp. 21-27, and will not be repeated here. But the legislative history of the section provides further indication of congressional thinking with regard to the intended impact of Section 10. For example, Rep. Gwynn, of the House Committee, in discussing the exceptions in 5 U.S.C. §701, indicated a belief that Section 10 was intended to cover most review situations and that jurisdiction was assumed: "This bill does not give a court review in any case where review is now precluded by statute. It simply clarifies *and*

expands in some particulars the authority of the court in reviewing cases in which court review is not precluded by law." (Emphasis added.) *Id.* at 374-75.

The Secretary also suggests that the reopening issue is one that has been reserved to agency discretion, and that therefore Section 10 can have no applicability to the case. Govt. Br. at 26-27. The agrument is premised on the lack of specific entitlement in the Social Security Act to review of a reopening denial. Again, however, the legislative history runs counter to the Secretary's interpretation; the Senate Judiciary Committee Report, for example, notes that "Section 10 on judicial review relates not only to decisions made after agency hearing, but, in appropriate cases, to the exercise of any other administrative power or authority." S.R. 752, 79th Cong., 1st Sess. (1945) in S. Doc. No. 248 at 195. Congress was not suggesting, as the Secretary would have it, that the mere failure to include a specific situation among those which a review statute encompassed indicated that that situation was irretrievably left to agency discretion. Rather, as the Committee Report notes, *id.* at 212, the exception was simply a statement of existing and accepted law.

More relevant to the merits of this case is the intention of the APA's author, Sen. McCarran, that an aggrieved party have the opportunity for judicial review of an alleged abuse of discretion by the agency. On the floor of the Senate, the following exchange highlighted that approach:

> (Mr. Donnell) . . . In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been an abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion

from the right to have judicial review of the action so taken by the agency?

(Mr. McCarran) Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review. . . .

(Mr. Donnell) But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

(Mr. McCarran) It must not be an arbitrary decision. It must be a judicial discretion; it must be a discretion based on sound reasoning.

Proceedings in the Senate, March 12, 1946, in S. Doc. No. 248 at 310-11.

Respondent Sanders has contended that the Secretary's refusal to reopen his claim represents this sort of abuse of discretion. The mere fact that nothing in the Social Security Act explicitly requires reopening is hardly sufficient to put the Secretary's decision beyond the power of the courts to review. The opening paragraph of Section 10 was not directed at such a situation.[10]

The Secretary relies on *Stuckey v. Weinberger*, 488 F.2d 904 (9th Cir. 1973) (*en banc*) and *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975), to suggest that decisions made after a hearing are irrevocably committed to agency discretion. Govt. Br. at 26-27. *Stuckey* is, in fact, the only reopening case which held

[10] The exception applies only to matters that are "by law committed to the absolute discretion of administrative agencies . . . [The agencies] do not have any authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act." Rep. Walters, Proceedings in the House, March 12, 1946, in S. Doc. No. 248 at 368.

that such decisions are left purely to the discretion of the agency. *Ortego* only mentions the *Stuckey* holding, 516 F.2d at 1011, and sides "with the majority of courts that have allowed review of refusals to reopen prior social security applications pursuant to Section 10 of the APA." *Id.* at 1015. In fact, most reopening cases simply ignore the possibility that the decision whether to reopen is irrevocably committed to agency discretion; they assume the opposite, and focus their attention primarily on whether the decision was an abuse of discretion pursuant to Section 10(e) of the APA, 5 U.S.C. §706(2)(A).[11]

Without belaboring the issue, it is worth noting that the case on which most later decisions based their holdings with respect to the availability of APA jurisdiction presents a succinct analysis of the question of whether a refusal to reopen is solely within agency discretion. In *Cappadora v. Celebrezze, supra,* 356 F.2d at 6, Judge Friendly writes:

> [T]he discretion conferred in day-to-day administration cannot have been assumed to extend to unreasonable deviation from such rules on an *ad hoc* basis at the whim of the Administration. In this context, we do not believe that Congress would have wished to close the doors of the court to a plaintiff whose claims for social security benefits was denied because of a truly arbitrary administrative decision. . . . Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of a defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

[11] *See, e.g., Lejeune v. Mathews*, 526 F.2d 950 (5th Cir. 1976); *Hunt v. Weinberger*, 527 F.2d 544 (6th Cir. 1975); *Ruiz-Olan v. Secretary of Health, Education & Welfare*, 511 F.2d 1056 (1st Cir. 1975); *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1972); *Davis v. Richardson*, 460 F.2d 772 (3d Cir. 1972).

The Secretary also devotes substantial attention to the provision of Section 10 entitled "Right of review," 5 U.S.C. §702. In discussing this language, the Secretary places particular emphasis on the question of reviewability. Despite the apparent meaning of the language, that there will be review of an alleged wrong, the Secretary argues that the section is addressed only to the question of "which categories of persons are entitled to judicial review . . ." Govt. Br. at 27. There is little in the legislative history which provides assistance in understanding this section beyond the words themselves. *Amicus* contends that those words speak for themselves, and that the refusal to reopen is one of the situations contemplated by Congress in its comprehension of the section. Rep. Walter declared: "Legal wrong means action or inaction in violation of the law or the facts." Proceedings in the House, May 24, 1946, in S. Doc. No. 248 at 369. It is unlikely that Congress intended that only some, but not all, legal wrongs would be susceptible of judicial correction.

It is with respect to subsection 10(b), 5 U.S.C. §703, that the Secretary offers his most startling argument. The title of that section is "Form and venue of proceeding." Once again, part of the thrust of this section is to ensure that the APA will not be interpreted to affect specific statutory directives which are also applicable. Consequently, the first clause of the first sentence is not, as the Secretary argues, Govt. Br. at 28-29, a declaration of the need for a separate source of jurisdiction, but rather, a statement that where an explicit command exists as to the "specified" court appropriate for review of a particular matter, that statute should be followed. Thus, just as the opening clause of the introduction, 5 U.S.C. §701(a)(1), ensures that the APA will not supersede any statutes forbidding judicial review in specified situations, so does this

clause ensure that the APA will not supersede a statute specifying the appropriate form of review and court in which such review shall be had. This section was never intended to suggest implicitly that appropriate relief was dependent on the availability of an outside source of jurisdiction; rather, its purpose was to indicate that relief must be sought in an appropriate court if an applicable statute already existed.

The legislative history bears out this analysis. The minority position in the Attorney General's Report titled the section "Courts and venue," and directed that when a court is

> without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for so doing, to such court of competent jurisdiction as may be designated by the applicant or petitioner, which court shall, after permitting any necessary amendments, thereupon proceed as in other cases.

Deficiencies in form or type of remedy were to be resolved by amendment. Final Report of the Attorney General's Committee, *supra*, at 246. The provision, then, was solely intended to ensure that technical failures in seeking review, such as applying to the Court of Claims or to a Circuit Court instead of to a District Court, would not invalidate the appeal. Contrary to the Secretary's view, the implicit assumption of the section is that a court *does* exist with jurisdiction to review the agency decision; the concern is only that where an appropriate specific review statute exists, it should be followed.

The remainder of the first sentence, and the second sentence, are similarly devoted to the kind of review

available. The Senate Judiciary Committee's Report, in which the wording of the "Form and venue of action" section is almost identical to the present subsection 10(b) of the APA, notes that the "first sentence . . . is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative *whenever special forms of judicial review are lacking or insufficient.*" (Emphasis added.) S.R. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248 at 212. The purpose, of course, is to ensure that *some* kind of review will be available in all cases, but the form of that review will be dependent on whether a special type of proceeding has been previously described.

The second sentence of the section is a further effort to ensure that the appropriate court and method of proceeding will be utilized: "The exception for 'prior, adequate, and exclusive . . . review' in the second sentence is operative only where statutes, either expressly or as they are interpreted, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." *Id.* at 213. Rep. Walter best summarized the purpose and meaning of subsection 10(b): "The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress has made no contrary provision for judicial review." Proceedings in the House, May 24, 1946, in S. Doc. No. 248, at 369.

Thus, contrary to the Secretary's suggestion that the purpose of Section 703 was "to leave court jurisdiction in this area unchanged," Govt. Br. at 29, its actual intent was to ensure that the appropriate review

mechanism would be followed in the appropriate court. The assumption under which the section was proposed is that there will be review in all cases, and that consequently there is jurisdiction. Section 703 is devoted exclusively to determining how that review will be effected. To draw conclusions regarding jurisdictional thrusts is to ignore the language and history.

Amicus agrees with the Secretary's suggestion that Section 704 is not a grant of jurisdiction. Govt. Br. at 31. At the same time, the purposes of the section are worth noting. Among these purposes was a design to assure that agency action was reviewable regardless of the lack of a specific statutory requirement. In this respect, that first sentence is further indication that Congress intended to protect individuals from *all* agency action unless specifically excluded. It is once again inconceivable that Congress would have manifested such an intent, spelling out that both actions specifically reviewable by statute and others not explicitly enumerated, were reviewable, while assuming at the same time that the power to make such review required a separate source.

C. *Case law supports the APA as an independent grant of jurisdiction.*

While generally favoring review without regard to the amount in controversy, the commentators are divided as to whether the APA properly provides the jurisdictional basis for such review.[12] The Courts of Appeals,

[12] Compare Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967), Davis, *Administrative Law Treatise* §23.02 (Supp. 1970), Jaffe, *Judicial Control of Administrative Action* 165 (1965), with Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defend-*

however, heavily support the position taken by the Seventh Circuit.[13] And this Court, though not absolutely clear in its pronouncements, appears to have accepted that Section 10 confers jurisdiction. The Secretary argues, however, in line with his general approach, that these cases, *Rusk v. Cort,* 369 U.S. 367, *Abbott Laboratories v. Gardner,* 387 U.S. 136, and *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401

ant, 68 Mich. L. Rev. 389, 445 (1970), Wright, Miller & Cooper, *Federal Practice and Procedure,* §3568 (1975), and Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers-Jurisdictional Amount, the Administrative Procedure Act and Mandamus,* 51 Wash. L. Rev. 97, 114-115 (1975).

[13] Six circuits have accepted the APA as an independent grant of jurisdiction. See *Lejeune v. Mathews,* 526 F.2d 950, 952-953 (5th Cir. 1976); *Hunt v. Weinberger,* 527 F.2d 544, 546-547 (6th Cir. 1975); *Elton Orchards, Inc. v. Brennan,* 508 F.2d 493, 497 (1st Cir. 1974); *Bard v. Seamans,* 507 F.2d 765, 767-768, (10th Cir. 1974); *Pickus v. United States Board of Parole,* 507, F.2d 1107, 1109-1110 (D.C. Cir. 1974); *McEachern v. United States,* 321 F.2d 31, 33 (4th Cir. 1963). Only two have clearly stated that the APA does not provide jurisdiction. See *Grant v. Hogan,* 505 F.2d 1220, 1225 (3rd Cir. 1974); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 532 (8th Cir. 1967). Two circuits have indicated uncertainty in the area. Although the Second found APA jurisdiction in *Cappadora v. Celebrezze,* 356 F.2d 1, 5-6 (2d Cir. 1966), it later required that a jurisdictional amount be met in *Wolff v. Selective Service Board,* 372 F.2d 817, 826 (2d Cir. 1967). And, in more recent cases, it has indicated that the issue is unsettled. *South Windsor Convalescent Home, Inc. v. Mathews,* CCH Medicare and Medicaid Guide, ¶27, 918 (2d Cir., July 27, 1976); *Aguayo v. Richardson,* 473 F.2d 1090, 1101-1102 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); *Mills v. Richardson,* 464 F.2d 995, 1001 n.9 (2d Cir. 1972). The Ninth Circuit has offered several conflicting opinions on the issue within the last two years. Compare *Rothman v. Hospital Service of Southern California,* 510 F.2d 956, 958 (9th Cir. 1975) and *Proietti v. Levi,* 530 F.2d 836, 838 n.2 (9th Cir. 1976) (both finding APA jurisdiction) with *Nguyen da Yen v. Kissinger,* 528 F.2d 1194, 1201 and n.11, 12 (9th Cir. 1975) (finding no APA jurisdiction.)

U.S. 402, do not reach the jurisdictional issue, but rather resolve only the question of reviewability. *Amicus* submits that the Secretary's reasoning can draw no support from the actual holdings of these cases.

It is clear, as the Secretary acknowledges, Govt. Br. at 36, that the only question decided in *Cort* was whether the district court had jurisdiction to review an administrative decision that the plaintiff had lost his citizenship. 369 U.S. at 370. The Secretary argues, however, that the case was not actually concerned with jurisdiction, as that problem was effectively resolved by the nature of the right at stake. On the theory that citizenship satisfied the amount-in-controversy requirement of 28 U.S.C. §1331, the Secretary argues that that section must have been the basis for jurisdiction, thus rendering the discussion of the APA merely one concerning reviewability. Govt. Br. at 36. This gratuitious interpretation is contradicted by the Court's own comprehension of the issue.

Mr. Justice Stewart, speaking for the Court, wrote as follows:

> "On their face [the Declaratory Judgment Act and Sections 10 and 12 of the APA] appear clearly to permit an action such as was brought here to review the final determination of the Secretary of State." 369 U.S. at 372.

The Secretary's account also flies directly to the face of the history of the case. The decision of the three-judge court which initially ruled that there was jurisdiction for review noted explicitly that "authority to hear and determine [the case] was conferred upon the District Court by the Declaratory Judgments Act and the Administrative Procedure Act." [Footnote and citations omitted.] *Cort v. Herter,* 187 F. Supp. 683, 685

(D. Mass. 1960). Since the Declaratory Judgment Act is not a grant of jurisdiction, but only a procedural mechanism,[14] it necessarily follows that at all times, the APA was the only considered basis for jurisdiction.[15]

Justice Harlan in *Abbott Laboratories* carefully reviewed the applicable provisions of the APA. He summarized by observing that

> [t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions [footnote omitted], and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. *Shaugnessy v. Pedreiero*, 349 U.S. 48, 51 [other citations omitted]
> . . . .

387 U.S. at 140-41. Further, he noted that *Cort* had reemphasized the requirement that judicial review be available except upon a showing of clear and convincing congressional intent. *Id.* at 141. The issue in *Abbott Laboratories* was whether specific procedures for review of certain regulations necessarily precluded pre-enforcement review of regulations via the Declaratory Judgment Act and the APA. And, again, it was concluded that such review had not been precluded by the specific review statutes. In reaching that conclusion, the Court necessarily had to rely on the APA as the basis for jurisdiction, as this passage indicates:

> That the Court refused to permit such an action [for review in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594] is hardly authority for cutting off the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits under the Declaratory Judgment Act and the Administrative Procedure Act challenging final agency action of the kind present here.

Id., at 148.

With the Court's attention focused primarily on the availability of declaratory relief for pre-enforcement review, see *id.* at 154-55, relatively little effort was directed explicitly towards the jurisdictional question. The Secretary though, by ignoring the implicit acceptance of jurisdiction in the decision on reviewability, reaches a totally unwarranted conclusion that "in view of the nature of the case, which involved commercial interests that could be assumed to have a value substantially in excess of the amount-in-controversy requirement of 28 U.S.C. 1331," the Court specifically

[14] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667.

[15] The Secretary places substantial reliance, Govt. Br. at 36-37, on a statement in *Cort* to the effect that the Supreme Court had employed the Declaratory Judgment Act as a method for review of decisions of the Secretary of State, 369 U.S., at 372, both before and after the enactment of the APA. According to the Secretary, the import of this comment is that "the Court was invoking the pre-existing common law doctrine of the reviewability of administrative actions . . ." Govt. Br. at 37. In the context of the decision, however, it is clear that the Court's reference was specifically to the issue of whether a declaratory judgment was an appropriate "remedy to secure a determination of citizenship . . ." 369 U.S. at 372. The Court was only emphasizing that such a remedy had been available for some time, and that the APA had not altered that availability. This discussion was part of a larger argument as to whether the plaintiff was limited to the review procedures outlined in subsections (b) and (c) of §360 of the Immigration and Nationality Act of 1952. The Court noted that Section 12 of the APA forbade subsequent legislation from superseding or modifying the APA, except where expressly stated, and was therefore able to conclude that subsections (b) and (c) of §360 did not describe the sole available remedy. Consequently, the Court's discussion of the use of declaratory judgments both before and after the enactment of the APA was intended to indicate that that was a longstanding remedy, available where any legitimate grant of jurisdiction existed (including the APA), and that Section 12 of the APA rendered untenable the Secretary's position that the procedures of §360 took precedence.

avoided a jurisdictional discussion. Govt. Br. at 38. The Court's assumption, to the contrary, was that the APA encompassed both concepts of reviewability and jurisdiction. Section 1331 is nowhere mentioned; it is not needed.

The final leg in this trilogy, *Overton Park*, provokes a similar dismissal from the Secretary on the grounds that Section 1331 must have provided the jurisdictional basis. Again, such an analysis runs contrary to the explicit and implicit determinations of the reviewing courts. The district court specifically assumed jurisdiction under Section 10 of the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 309 F. Supp. 1189, 1193 (W.D. Tenn. 1970). The appellate court never considered jurisdiction, apparently assuming that that was not in issue.[16] And the Supreme Court, through Justice Marshall, indicated its belief that the APA was the appropriate vehicle for testing the action of the Department of Transportation. 401 U.S. at 410-13.[17] Again, the Secretary suggests that the APA discussion

[16] Judge Celebrezze suggested in dissent, however, that the cause be remanded for the district court to reconsider under the mandamus jurisdiction of 28 U.S.C. §1361. 432 F.2d, at 1318.

[17] A reference to *Overton Park* by the Fifth Circuit in *Ortego v. Weinberger, supra*, at 1013, is strongly supportive of a Supreme Court comprehension of the APA as a jurisdictional statute. The panel writes: "[A]lthough the Court [in *Overton Park*] might have availed itself of 28 U.S.C. §1337 (acts regulating commerce) as the jurisdictional cornerstone, it did not. Instead, it relied exclusively on Section 10 of the APA, thereby indicating that the Act serves both jurisdictional and remedial functions." (Footnote omitted.) This point is, of course, also applicable to this Court's failure to employ Section 1331: although either section might conceivably have been stretched to represent the jurisdictional basis, the refusal to do so is an implicit recognition, as the Fifth Circuit suggests, that the effort was intended to emphasize the jurisdictional use of the APA in administrative review cases.

was relative only to the question of reviewability; and, again, that analysis is rebutted by this Court's own finding that jurisdiction and review are encompassed in the same concept. That finding, rather than the Secretary's contention that Section 1331 jurisdiction lies behind these cases, is the logical comprehension of the three. The decisions represent more than a mere "presumption favoring judicial review" (Govt. Br. at 39); they are a statement on the availability of the APA as a source of jurisdiction for review of agency decisions in cases not otherwise excluded.

By his *ex post facto* reliance on Section 1331 as the assumed source of jurisdiction in these cases, the Secretary has accentuated the basic problem with reliance on that section in cases involving acts of administrative agencies. The inquiry it sets up is generally irrelevant.[18] There is no legitimate rationale for requiring that judicial review of administrative action have a $10,000 figure attached to it. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 220 (1948).[19] Congress recognized this, and freed plaintiffs

[18] "It does seem inapt to make it a condition of a suit against an officer that the right asserted be given a value, if indeed in many cases it is even possible." Jaffe, *Judicial Control of Administrative Action*, 165 (1965).

[19] See also *Recommendations and Reports of the Administrative Conference of the United States*, 169-180 (1970). Recommendation No. 7 urges the elimination of "any requirement of a minimum jurisdictional amount before U.S. district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer of the United States or any agency thereof, acting under color of Federal law." *Id.*, at 196. The report on this recommendation, by Prof. Cramton, briefly analyzes Section 10, noting that a finding of a jurisdictional grant in the APA "would go far to ameloriate the problems with which this recommendation is concerned." *Id.*, at 179.

from resort to such manipulation of the amount in controversy as the Secretary has attempted. It must be concluded that Section 1331 was not contemplated as a source of review for administrative actions, and that the APA was viewed as providing the appropriate jurisdictional mechanism.

In the end, of course, the Secretary is correct to the extent that he claims that the APA does not explicitly present an independent grant of jurisdiction. But its language and history heavily suggest that that has been the implicit assumption of its creators and its interpreters. Perhaps even more persuasive, however, is the common-sense approach to the APA. In his discussion of *Rusk v. Cort*, Prof. Davis concludes that Section 10 was the basis for jurisdiction, even though this Court's analysis was primarily focused on the Immigration Act. In response to the question as to why such a seemingly important issue was resolved in such an offhand manner, he asks this rhetorical question: "But should the Court be expected to write a legal analysis to show that a person who is 'entitled' to review should not be denied review?" Davis, *Administrative Law Treatise* §23.02 at 790 (Supp. 1970). In short, if the APA does not provide an independent grant of jurisdiction for review of agency decisions, the ten years of study, analysis and drafting which preceded it yielded far less than its framers intended.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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APPENDIX

I. Reported cases[1] with opinions in which the court found jurisdiction to review the Secretary's refusal to reopen[2]:

A. Cases upholding the Secretary's refusal to reopen (i.e., no abuse of discretion found):

1974 (Calendar Year)

Green v. Weinberger, 500 F.2d 203 (5th Cir. 1974).

Stonestreet v. Secretary of H.E.W., 494 F.2d 342 (4th Cir. 1974)[3].

Borg v. Weinberger, 381 F. Supp. 1212 (E.D. Mich. 1974).

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[1] The term "reported cases" refers to all cases reported in the West Reporter system (Federal Supplement and Federal Second) as well as any cases reported in the Commerce Clearing House, Unemployment Insurance Reporter, a service which reports many decisions which are not published in the West system.

[2] In two additional cases, the plaintiff/claimant challenged the Secretary's decision to reopen an earlier favorable determination. In both cases, the court upheld the Secretary's decision to reopen. *Briggs v. Weinberger*, CCH Unempl. Ins. Rep. [January, 1975-January 1976 Transfer Binder] ¶14,317 (D. Md. 1975); *Strickland v. Weinberger*, CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,829 (M.D. Ala. 1974). The list does not include the case presently before this Court, since this case involved a remand to the District Court to decide whether the Secretary did in fact abuse his discretion in failing to reopen. *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975).

[3] In *Stonestreet*, while the Hearing Examiner did not find res judicata applicable because of his interpretation of the 1965 amendments to the Social Security Act and denied the claim on the merits, the court held that res judicata should have barred the claim and that implicit in the Hearing Examiner's decision was the finding that, but for his interpretation of the '65 amendments, he would have otherwise found no basis for reopening the claim.

Dyson v. Weinberger, CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,895 (S.D. Ohio 1974).

Webber v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,078 (W.D. Mich. 1974).

Woods v. Weinberger, 391 F. Supp. 318 (E.D. Tenn. 1974).

1975 (Calendar Year)

Hunt v. Weinberger, 527 F.2d 544 (6th Cir. 1975).

Johnson v. Weinberger, 525 F.2d 403 (7th Cir. 1975).

Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975).

Ruiz-Olan v. Secretary of H.E.W., 511 F.2d 1056 (1st Cir. 1975).

Shell v. Weinberger, 402 F. Supp. 1201 (E.D. Tenn. 1974). *Aff'd.* 521 F.2d 1401 (6th Cir. 1975).

Hines v. Weinberger, 395 F. Supp. 1215 (D. Wyom. 1975).

Jamison v. Secretary of H.E.W., 394 F. Supp. 296 (E.D. Mich. 1975).

Wright v. Weinberger, 391 F. Supp. 390 (D. Md. 1975).

B. Cases reversing the Secretary's refusal to reopen (i.e., abuse of discretion found):

1974 (Calendar Year)

Anderson v. Weinberger, 380 F. Supp. 640 (D. Md. 1974).

Chenoweth v. Weinberger, 376 F. Supp. 1338 (W.D. Mo. 1974)[4].

[4] One of the three cases in which, while the Court did not explicitly find an abuse of discretion, there was a remand to the Secretary to make specific findings which the Secretary had failed to make on the reopening/res judicata question.

Sullivan v. Secretary of H.E.W., CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,837 (W.D. Ky. 1974).

Negron v. Secretary of H.E.W., 382 F. Supp. 913 (D. P.R. 1974)[4].

1975 (Calendar Year)

Brinker v. Weinberger, 522 F.2d 13 (8th Cir. 1975).

Coulter v. Weinberger, 527 F.2d 224 (3rd Cir. 1975).

Griffin v. Weinberger, 511 F.2d 1403 (6th Cir. 1975) (decision reported at CCH Unempl. Ins. Rep. [January, 1975-January 1976 Transfer Binder] ¶14,115).

Lauritzen v. Weinberger, 514 F.2d 561 (8th Cir. 1975).

Burns v. Weinberger, 394 F. Supp. 1179 (W.D. Mo. 1975).

Dunson v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,135 (E.D. Mich. 1975).

Lake v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,368 (D.S.C. 1975).

Magel v. Weinberger, 1A CCH Unempl. Ins. Rep. ¶14,550 (W.D. Ky. 1975).

II. Reported cases[1] with opinions in which the court does not explicitly discuss the issue of reopening but in which the court reviews the Secretary's dismissal of a claim on the basis of administrative res judicata:

A. Cases upholding the Secretary's dismissal:

Absher v. Secretary of H.E.W., 371 F. Supp. 873 (M.D. N.C. 1974).

Carter v. Weinberger, 512 F.2d 520 (4th Cir. 1975).

B. Cases reversing the Secretary's dismissal:

Crouch v. Secretary of H.E.W., 378 F. Supp. 1384 (S.D. N.Y. 1974)[5].

Courll v. Weinberger, 393 F. Supp. 1033 (E.D. Cal. 1975)[4].

Total reported court cases in 1974 - 1975 upholding the Secretary's decision: 16.

Total reported court cases in 1974 - 1975 reversing the Secretary's decision: 14.

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[5] In *Crouch*, the issue of res judicata was apparently raised by the Secretary for the first time during judicial review. The Secretary had not dismissed the claim during the administrative process but rather made a final decision on the merits.